

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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Homesite Insurance Company as subrogee  
of Traci Marx and Raymond Marx,

Plaintiff,

v.

Norcold, Inc.; Norcold, LLC; Thetford  
Corporation; Thetford, LLC; Camping World  
of Henderson; Camping World, Inc.; and CWI,  
Inc.,

Defendants.

And related consolidated claims.

Case No. 2:21-cv-02167-RFB-DJA

**Order**

This is a products liability case arising out of a refrigerator fire that burned a recreational vehicle owned by Plaintiffs Traci and Raymond Marx and partially damaged a home owned by the Marxes in which their friends, Plaintiffs Alyssa and Seth Dillard, were living. Homesite Insurance Company insured the RV and sued Norcold, Inc. and Thetford Corporation<sup>1</sup>—the makers of the refrigerator—along with Camping World of Henderson and Camping World, Inc.<sup>2</sup>—which had sold the RV to the Marxes—for damages in state court. In a separate action, Plaintiffs Traci and Raymond Marx and Alyssa and Seth Dillard sued Norcold, Inc.; Thetford Corporation; the Dyson-Kissner-Moran Corporation (“DKM”); Camping World Holdings, Inc.; Camping World, Inc.; CWI, Inc.; and Camping World of Henderson. The Court consolidated the two actions into this action.

<sup>1</sup> The Court refers to Norcold and Thetford collectively as the “Norcold Defendants.” Additionally, Norcold, Inc. and Thetford Corporation have since converted to limited liability companies and have been substituted as parties in this action.

<sup>2</sup> The Court refers to Camping World of Henderson; Camping World, Inc.; Camping World Holdings, Inc.; and CWI, Inc. collectively as the “Camping World Defendants.”

1 Homesite moves to amend its complaint to add DKM as a defendant, asserting that  
2 DKM—which previously owned Norcold and Thetford—was involved in the manufacture of the  
3 refrigerator and thus, should be a party to the action. (ECF No. 68). Homesite also jointly moves  
4 for a protective order together with the Marxes and Dillards, arguing that, despite the parties’  
5 attempts, they have been unable to agree on the terms of a protective order to govern discovery  
6 exchanges. (ECF No. 69). The Norcold Defendants move to quash and for a protective order,  
7 arguing that a subpoena that Plaintiffs noticed to depose the Norcold Defendants’  
8 Chairman/President and Director is an improper apex deposition. (ECF Nos. 80, 81).

9 Because the Court does not find that Homesite’s proposed amendment would be futile, it  
10 grants the motion to amend. (ECF No. 68). Because the Court finds that certain of Homesite’s  
11 proposed protective order language is appropriate, but that other proposed language is not, it  
12 grants in part and denies in part Homesite’s motion for a protective order and will require the  
13 parties to file a stipulated protective order with the language the Court provides. (ECF No. 69).  
14 Because the Court finds that Plaintiffs are attempting to conduct an improper apex deposition and  
15 that a subpoena was improper in this matter, the Court grants the motion to quash and motion for  
16 protective order. (ECF Nos. 80, 81).

17 **I. Background.**

18 ***A. Homesite’s motion to amend its complaint.***

19 On March 2, 2023, Homesite moved to amend its complaint to add DKM as a party.  
20 (ECF No. 68). It asserts that the Norcold Defendants would not stipulate to adding DKM because  
21 the statute of limitations had run but that it could not add DKM sooner because it has been unable  
22 to obtain information through discovery about DKM’s role in creating the refrigerator. Homesite  
23 alleges that, based on information and belief, DKM played a role in manufacturing or designing  
24 the refrigerator at issue. Homesite adds that the amendment relates back to the original complaint  
25 because it arises out of the same occurrence. It also argues that DKM has notice of the lawsuit  
26 because it is a party in the other, consolidated action and its attorneys are the same.

27 The Norcold Defendants respond that Homesite’s proposed amendment would be futile  
28 because Homesite cannot satisfy the relation back requirements under either federal or Nevada

1 law. (ECF No. 73). They assert that Homesite cannot show that either by February 3, 2022  
2 (under the federal standard) or March 7, 2022 (under the Nevada standard) DKM received notice  
3 that it would be sued by Homesite and that DKM knew or should have known that but for a  
4 mistake concerning its identity, it would have been sued by Homesite. The Norcold Defendants  
5 argue that DKM is merely a holding company and was not involved in the design or manufacture  
6 of the refrigerator. They also argue that Homesite failed to satisfy the Doe pleading requirements  
7 of Nevada Rule of Civil Procedure 10 and failed to be diligent in moving to amend its complaint.

8 Homesite replies that its claims against DKM do relate back under either federal or  
9 Nevada law. (ECF No. 76). It argues that DKM had notice of the suit by virtue of being involved  
10 in the consolidated action. Regarding the mistake-in-identity prong, Homesite points out that  
11 because the parties have been unable to agree on a protective order in this case, discovery has  
12 stalled and Homesite was unable to determine DKM's role in the events giving rise to Homesite's  
13 case more promptly. Homesite adds that it does not seek to add DKM as a Doe under NRCP 10  
14 and thus those standards do not apply to it.

15 ***B. Plaintiffs' joint motion for protective order.***

16 Plaintiffs Homesite, the Marxes, and the Dillards jointly move for a protective order,  
17 asserting that, despite attempting to work together with Defendants to come up with a protective  
18 order to govern the parties' exchange of information, the parties have been unable to agree on the  
19 terms of that order. (ECF No. 69). Plaintiffs attach a proposed protective order. (*Id.* at 17-33).  
20 Norcold, Thetford, and DKM oppose Plaintiffs' motion, which opposition the Camping World  
21 Defendants join (collectively, "Defendants"). (ECF Nos. 78, 79). Defendants propose a  
22 protective order similar to one to which they are bound in a different case in the Eastern District  
23 of North Carolina—*Leslie Cohen et al. v. Norcold, Inc. et al.*, Case No. 5:20-cv-00170-BO—  
24 because it would be easier for Defendants to comply with the terms of one protective order, rather  
25 than attempting to comply with conflicting protective orders. Alternatively, Defendants propose  
26 changes to the protective order suggested by Plaintiffs.

27 Plaintiffs reply that their protective order is based on a protective order to which  
28 Defendants stipulated in another action in the Ninth Circuit and is based on the Model Protective

1 Order for the Northern District of California. (ECF No. 84). Additionally, Plaintiffs point out  
2 that the parties worked for months meeting and conferring on their proposed protective order and  
3 that Defendants' attempt to instead use the *Cohen* order would jettison the entire endeavor.  
4 Plaintiffs assert that the Court should grant the provisions of the protective order on which the  
5 parties have come to agree and decide the disputed provisions.

6 ***C. The Norcold Defendants' motion to quash and for protective order.***

7 Plaintiffs issued a notice of intent to serve a subpoena seeking to depose the  
8 Chairman/President and Director of Norcold and Thetford: Justin Hillenbrand. That subpoena  
9 listed two topics for deposition: (1) the conversion of Norcold and Thetford from corporations to  
10 limited liability companies; and (2) the Dyson-Kissner-Moran Corporation's sale of Thetford and  
11 Norcold to Monomoy Capital Partners in 2021. The Norcold Defendants move for a protective  
12 order or to quash Plaintiffs' subpoena to Mr. Hillenbrand. (ECF Nos. 80, 81). Defendants point  
13 out in support of their motion to quash that, although Mr. Hillenbrand is not a named party,  
14 because he is the Chairman/President and Director of Norcold and Thetford—named  
15 defendants—that the subpoena was unnecessary. In arguing that the Court should issue a  
16 protective order, the Norcold Defendants point out that Mr. Hillenbrand is an apex deponent and  
17 other, lower-level employees of Norcold and Thetford are knowledgeable of the topics in the  
18 subpoena to Mr. Hillenbrand, thus deposing Mr. Hillenbrand would be improper under the apex  
19 doctrine. Indeed, Plaintiffs included identical topics in their 30(b)(6) notices. The Norcold  
20 Defendants add that the topics are neither relevant nor proportional because the sale of Norcold  
21 and Thetford have no bearing on the instant products liability issue and does not affect  
22 jurisdiction in this matter.

23 Plaintiffs respond that the apex doctrine does not operate to protect Mr. Hillenbrand from  
24 deposition because he was involved in DKM's sale of Norcold and Thetford to non-party  
25 Monomoy Capital Partners and the conversion of both Norcold and Thetford to limited liability  
26 companies. (ECF No. 89). They add that, because the sale occurred after the lawsuit was filed  
27 but before the Norcold Defendants removed the action to federal Court, Plaintiffs need to  
28 question Mr. Hillenbrand about the corporate reorganization and what that means for jurisdiction.

Specifically, Plaintiffs assert that they need to determine the citizenship of all partners of Monomoy Capital Partners two levels down to determine whether jurisdiction is appropriate because partnerships are citizens of every state of which its members are citizens. Plaintiffs also assert that the relationship between DKM, Thetford, and Norcold is relevant to whether DKM is liable for the defective refrigerator, or whether Norcold and Thetford, or any other successor companies, are liable.

The Norcold Defendants reply regarding Plaintiffs' argument that they need to understand the corporate reorganization of the Norcold Defendants for jurisdiction purposes, that Norcold is an LLC which is solely owned by Thetford and Thetford is an LLC that is solely owned by Yosemite Acquisition Company, a non-party to this action.<sup>3</sup> (ECF No. 90). Thus, the citizenship of Monomoy Capital Partners has no bearing on the case. The Norcold Defendants also point out that Mr. Hillenbrand's knowledge of the sale and reorganization of the companies is not unique and that Plaintiffs can determine the information they seek from the Rule 30(b)(6) depositions they have noticed.

## **II. Discussion.**

### ***A. Homesite's motion to amend.***

Generally, a party may amend its pleading once "as a matter of course" within twenty-one days of serving it, or within twenty-one days after service of a responsive pleading or motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* "The court considers five factors [under Rule 15] in assessing the propriety of leave to amend—bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011).

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<sup>3</sup> The Norcold Defendants explain that Yosemite Acquisition Corporation is a Delaware Corporation with its principal place of business in Michigan and thus its citizenship does not impact jurisdiction in this case. (ECF No. 81 at 14). It is unclear from the briefings what the relationship is between Yosemite and Monomoy.

1 Not all of these factors carry equal weight and prejudice is the “touchstone.” *Eminence Capital,*  
2 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Absent a showing of prejudice or a  
3 strong showing of any of the remaining factors, there is a presumption that leave to amend should  
4 be granted. *Id.* “In exercising this discretion, a court must be guided by the underlying purpose  
5 of Rule 15—to facilitate decision on the merits, rather than on the pleadings or technicalities.”  
6 *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991) (quoting *United States v. Webb*, 655  
7 F.2d 977, 979 (9th Cir. 1981)). Generally, the analysis “should be performed with all inferences  
8 in favor of granting the motion.” *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir.  
9 1999).

10 “Denial of leave to amend on this ground [futility] is rare. Ordinarily, courts will defer  
11 consideration of challenges to the merits of a proposed amended pleading until after leave to  
12 amend is granted and the amended pleading is filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D.  
13 534, 539 (N.D. Cal. 2003). “Deferring ruling on the sufficiency of the allegations is preferred in  
14 light of the more liberal standards applicable to motions to amend and the fact that the parties’  
15 arguments are better developed through a motion to dismiss or motion for summary judgment.”  
16 *Steward v. CMRE Fin. Servs., Inc.*, No. 2:15-cv-00408-JAD-NJK, 2015 WL 6123202, at \*2 (D.  
17 Nev. Oct. 16, 2015). The party opposing the amendment bears the burden of showing why leave  
18 should be denied, *Desert Protective Council v. U.S. Dept. of the Interior*, 927 F. Supp. 2d 949,  
19 962 (S.D. Cal. 2013) (citing *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530–31 (N.D. Cal.  
20 1989)), including the burden of establishing prejudice, *DCD Programs, Ltd. v. Leighton*, 833 F.2d  
21 183, 187 (9th Cir. 1987).

22 Leave to amend should be denied as futile “only if no set of facts can be proven under the  
23 amendment to the pleadings that would constitute a valid and sufficient claim.” *Barahona v.*  
24 *Union Pac. R.R.*, 881 F.3d 1122, 1134 (9th Cir. 2018) (quoting *Sweaney v. Ada County*, 119 F.3d  
25 1385, 1393 (9th Cir. 1997)). A plaintiff is not required to produce evidence supporting the  
26 amended complaint at the pleading stage; rather an amended complaint must plead facts sufficient  
27 to plausibly state a claim. *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988),  
28 *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citation omitted) (stating

1 that standard for considering whether amendment would be futile is the same standard used when  
2 considering the sufficiency of a pleading challenged under Rule 12(b)(6)). “The test to be applied  
3 to determine legal sufficiency (i.e., futility) of a proposed amendment is the same standard used  
4 when considering the sufficiency of a pleading challenged under Rule 12(b)(6).” *Seneca*  
5 *Insurance Company, Inc. v. Alpine Insurance Associates, Inc.*, No. 3:18-cv-00087-MMD-WGC,  
6 2021 WL 2637322, at \*2 (D. Nev. June 25, 2021) (internal citations and quotations omitted). A  
7 proposed amendment would not be considered futile if questions of fact need to be resolved in  
8 determining whether an actionable claim exists. *Id.*

9 Here, the Court grants Homesite’s motion to amend. DKM argues that Homesite’s  
10 amendment would be futile because the statute of limitations has run, Homesite cannot  
11 demonstrate relation back, and because DKM was not involved in designing the refrigerator at  
12 issue in this case. However, each of these arguments is more properly made through a motion to  
13 dismiss. Homesite has argued that its claims against DKM relate back because the claim against  
14 DKM arises out of the same conduct set forth in the original complaint, DKM had notice of the  
15 original action, and because DKM should have known that, but for delays in exchanging  
16 discovery that reveal its involvement, Homesite would have named it in the complaint. Whether  
17 Homesite will be successful on these arguments remains to be seen. But given Homesite’s  
18 arguments, the Court cannot find that it could prove no set of facts under the amendment that  
19 would constitute a valid and sufficient claim. Considering the underlying purpose of Rule 15—to  
20 facilitate decision on the merits, rather than on the pleadings or technicalities—the Court grants  
21 the motion to amend.

22 ***B. Plaintiffs’ joint motion for protective order.***

23 Because the parties have already met and conferred and agreed to numerous terms, the  
24 Court declines to enter Defendants’ proposed protective order, which would abandon the terms to  
25 which the parties have agreed. Instead, the Court will consider each of the parties’ arguments  
26 regarding the provisions of the protective order on which they disagree and will require the  
27 parties to file a stipulated protective order in accordance with the Court’s decisions on each.  
28

1                   1.       Paragraph 1 – Purposes and Limitations.

2           Plaintiffs assert that the protective order should govern only pretrial disclosure and  
3   discovery, but not the trial. Defendants assert that the protective order should also cover the trial,  
4   particularly because Defendants will be producing sensitive information related to the design,  
5   development, and testing of the refrigerator. Defendants have the better argument. The Court  
6   will thus require that the parties’ stipulated protective order apply to this case in its entirety.

7                   2.       Paragraph 2.6 – Definition of “Expert.”

8           Plaintiffs assert that expert should be defined as a person “with specialized knowledge or  
9   experience in a matter pertinent to the litigation.” Defendants assert that this definition presumes  
10   without proof that anyone that Plaintiffs retain as an expert has specialized knowledge or  
11   experience without Plaintiffs bearing the burden of affirmatively proving that the individual is  
12   qualified as an expert. Alternatively, Defendants assert that the defined term should be removed  
13   entirely because it is unnecessary. The Court agrees that it is unnecessary to define the term  
14   expert for the purposes of a protective order. As Plaintiffs point out, that an expert is a party who  
15   may view confidential information under a protective order does not create the presumption that  
16   the individual is qualified as an expert to testify or satisfy the burden of establishing the relevant  
17   and admissibility of that testimony. The parties should eliminate this defined term from their  
18   stipulated protective order.

19                  3.       Paragraph 3 – Scope of Protective Order.

20           Plaintiffs assert that the Defendants want the scope of the protective order to be too broad,  
21   presuming all discovery material to be confidential until proven otherwise. Plaintiffs assert that  
22   Defendants’ request that confidential documents include those published openly to the public on  
23   PACER, more than five years old, and otherwise already known to Plaintiffs is overbroad.  
24   Defendants assert that Plaintiffs’ proposed language would not adequately protect confidential  
25   material because it would exclude from protection any information that is more than five years  
26   old and information used at any court hearing or proceeding. Defendants assert that the danger of  
27   excluding information already known to Plaintiffs from being confidential is that Plaintiffs’  
28   counsel has filed numerous lawsuits against Norcold and thus already has significant confidential



1 information within his control. Having considered the parties' arguments, the Court will require  
2 the scope of protections conferred by the protective order to remain the same. However, the  
3 Court will amend the exceptions to that scope as follows, removing the exclusions for information  
4 "widely disseminated," more than five years old, and information that may be presented at any  
5 court hearing or proceeding:

6           However, the protections conferred by this Stipulation and Order do  
7 not cover the following information: (a) any information that is in  
8 the public domain at the time of disclosure to a Receiving Party or  
9 becomes part of the public domain after its disclosure to a Receiving  
10 Party as a result of publication not involving a violation of this  
11 Order, including becoming part of the public record through trial or  
12 otherwise; and (b) any information lawfully acquired by or known  
13 to the Receiving Party from a source independent of the Designating  
14 Party and which source obtained the information lawfully and under  
15 no obligation of confidentiality to the Designating Party.

16           The Court also modifies the sentence stating that "[a]ccordingly, any use of Protected  
17 Material at trial shall be governed by a separate agreement or order" to state "any use of Protected  
18 Material at trial may be governed by a separate agreement or order." The parties' stipulated  
19 protective order must include the language above in lieu of the disputed language.

20           4.     Paragraph 4 – Duration.

21           Plaintiffs argue that the protective order should be subject to future modification by the  
22 Court, which is standard procedure for protective orders. Defendants argue that the protective  
23 order should remain in place without being subject to potential modification. Defendants assert  
24 that allowing Plaintiffs to later modify the protective order will give them two bites at the apple to  
25 argue that information is not confidential or entitled to protection under the protective order.  
26 Plaintiffs have the better argument. Defendants' concern that Plaintiffs will later attempt to  
27 modify the protective order to re-argue confidentiality designations can be addressed by  
28 Defendants in their briefing should Plaintiffs seek to modify the protective order. If the Court  
were to prohibit any modifications to the protective order on the grounds that Plaintiffs might  
seek to amend it improperly, the protective order would function as an improper advisory

1 opinion. The language proposed in Plaintiffs' protective order shall govern and the parties must  
2 include that language in their stipulated protective order. (ECF No. 69 at 20, ¶ 4).

3 5. Paragraph 5.1 – Designating Protected Material.

4 Plaintiffs argue that this paragraph's requirement that parties must "take care to limit any  
5 [confidentiality] designation to specific material that qualifies under the appropriate standards"  
6 and prohibiting "[m]ass, indiscriminate, or routinized designations" is necessary because  
7 Defendants have a history of "designating every scrap of paper 'Confidential.'" Defendants  
8 respond that they have no qualms with exercising restraint and have even included similar  
9 language in their own proposed protective order. Defendants assert that Plaintiff's proposed  
10 language includes improper language regarding the potential imposition of sanctions on a  
11 designating party in an attempt to set a sanctions trap.

12 Because the parties essentially agree that the protective order should prohibit over-  
13 designation and require the parties to exercise care, the Court will require the stipulated protective  
14 order to contain Defendant's proposed language—included below—which succinctly describes  
15 this agreement. The Court will require the stipulated protective order to remove reference to  
16 sanctions. If one party believes that the Court should sanction another party for their  
17 designations, they may make their arguments regarding those sanctions in the appropriate motion.

18 Each Party or Non-Party that designates information or items for  
19 protection under this Order must take care to limit any such  
20 designation to material that qualifies for protection under the  
21 appropriate standards. To the extent it is practicable to do so, the  
22 Designating Party must designate for protection only those parts of  
23 discovery that qualify so that other portions of the discovery for  
24 which protection is not warranted are not swept unjustifiably within  
25 the ambit of this Order. Indiscriminate designations are prohibited.

24 6. Paragraph 5.2 – Manner and Timing of Designations for Testimony.

25 Plaintiffs argue that their proposed designation process requires the Designating Party to  
26 make their designations during a deposition, which provides an opposing party notice at a point  
27 where they can still redirect their questioning to avoid a confidentiality designation. Their  
28 language would also place a twenty-day limit on retroactive confidentiality designations, requires

1 that the designations be limited, and requires that the designated portions of a deposition be  
2 separately bound. Plaintiffs assert that Defendant's proposal of a thirty-day window to make  
3 retroactive designations is unreasonable. Defendants respond that the thirty-day language would  
4 afford Defendants and all other parties sufficient time to actually receive a deposition or hearing  
5 transcript, analyze it, and determine what, if anything, should be confidential.

6 The Court does not agree that thirty days, as opposed to twenty, is unreasonable. Instead,  
7 thirty days ensures that all parties receive the information and have sufficient time to designate it.  
8 The Court will thus require that the parties' stipulated protective order contain Defendants'  
9 proposed language, with amendments by the Court as outlined below:

10 **(b) for testimony given in deposition or in other pretrial or trial**  
11 **proceedings,** that the Designating Party identify either on the  
12 record, before the close of the deposition, hearing, or other  
13 proceeding or within thirty (30) days after the deposition, hearing,  
14 or other pretrial proceeding, all protected testimony. Until  
15 expiration of the referenced 30-day period, the entire transcript of  
16 the testimony shall be treated as confidential and subject to  
protection against disclosure under this Order. Only those portions  
of the testimony that are appropriately designated for protection  
within the 30-day period shall be covered shall be covered by the  
provisions of this Order.

17 7. Paragraph 5.3 – Inadvertent Failures to Designate.

18 Plaintiffs argue that the timeframe for designating documents inadvertently produced  
19 without designations should be thirty days from the time of production. Defendants argue that  
20 there should be no timeframe imposed on a producing party to notify the receiving party of an  
21 inadvertent failure to designate information or material as confidential. In the event the Court  
22 finds a timeframe appropriate, Defendants suggest that the deadline should be thirty days after  
23 production or within seven days of the producing party learning of the inadvertent failure to  
24 designate. Defendants also assert that the protective order should set forth clear guidelines on  
25 what a party must do when notified that it has received confidential information inadvertently.  
26 Defendants propose that "upon receiving notice of an inadvertent failure to designate confidential  
27 information, the receiving party should be required to immediately retrieve and destroy all  
28 unmarked material and substitute therefore appropriately marked material, and the receiving party

1 shall not thereafter disclose or use any such unmarked material or any information contained  
 2 therein.” Defendants add that the protective order should include language that a party’s  
 3 inadvertent failure to designate confidential information does not waive the party’s right to secure  
 4 protection of the information under the protective order.

5 Defendants have the better argument. To the extent that a party believes that another  
 6 party had actual notice of an inadvertently produced document and nonetheless waited to make  
 7 that designation, that party may make the appropriate motion. The parties must include  
 8 Defendants’ proposed language in their stipulated protective order.

9 8. Paragraph 6.3 – Challenging Confidentiality Provisions.

10 Plaintiffs assert that the parties’ dispute over the provisions of this paragraph involve  
 11 which party bears the burden of a confidentiality designation. Plaintiffs argue that the designating  
 12 party should be the one to support the designation by filing a motion to maintain the designation.  
 13 Defendants assert that the party seeking to remove the designation should be the one to file a  
 14 motion and ask the Court to remove the designation. The Court disagrees with the parties that the  
 15 protective order should dictate which party can file a motion over this issue. If a party seeks  
 16 relief from the Court, they may file the appropriate motion. The Court will thus require the  
 17 parties to replace paragraph 6.3 with the below language:

18 In the event that the parties are unable to resolve their disputes in  
 19 the meet-and-confer process, either party may file an appropriate  
 20 motion with the Court challenging or defending the confidentiality  
 21 designation. Any motion must be accompanied by a declaration  
 22 affirming that the movant has complied with the meet and confer  
 23 requirements imposed in the preceding paragraph. The burden is on  
 the party designating the document confidential to support its claim  
 of confidentiality. The parties shall treat the documents as  
 confidential until the Court rules otherwise.

24 9. Paragraph 7.1 – Access to and Use of Protected Material.

25 The parties disagree over whether this section should include language stating that “[a]  
 26 Receiving Party’s failure to comply with this Paragraph 7 shall subject the Receiving Party to  
 27 sanctions.” Plaintiffs assert that Defendants are trying to include the language as a sanctions trap.  
 28 Defendants assert that the language is necessary because Plaintiffs’ counsel has a history of

disclosing opposing party's confidential information in violation of protective orders. The Court finds the sanction language unnecessary. If a party believes another party has violated the protective order and that sanctions are warranted, they may bring the appropriate motion. The parties should omit this language from their stipulated protective order.

10. Paragraph 10 – Unauthorized Disclosure of Protected Material.

Plaintiffs argue that Defendants are attempting to set impossible standards for Plaintiffs to follow by “imposing further burdens on the party who has made an unauthorized disclosure to ensure that the person receiving the protected material does not use it or further disclose it, and that the party who has made an unauthorized disclosure require that the person in receipt of such material execute the Agreement to be Bound.” Defendants assert that the proposed language is reasonable. The Court finds a middle ground to be appropriate here and will require the parties to include the below language in their stipulated protective order:

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) notify in writing the party to whom the disclosure was made of the unauthorized disclosure, (c) use its best efforts to retrieve all unauthorized copies of the Protected Material as well as request that the party to whom disclosure was made does not further use and/or disclose such Protected Material, (d) inform the person or persons to whom unauthorized disclosures were made of all terms of this order, and (e) request that such person or persons execute the “Acknowledgement and Agreement to Be Bound” that is attached hereto as Exhibit A.

11. Paragraph 11 – Inadvertent Production of Privileged or Otherwise Protected Material.

Plaintiffs argue that this section should include a time limit such that a party who inadvertently discloses protected material would only have thirty days after production to designate the information confidential and claw it back. Plaintiffs assert that this would prevent the gamesmanship of a party “waiting for the Receiving Party to attempt to use the material, only to claim that the material was ‘inadvertently produced’...” Defendants respond that Plaintiffs’

1 proposed timeline is not supported by Federal Rule of Civil Procedure 26(b)(5)(B), which  
 2 provides for reclaiming inadvertently disclosed information without any timeline. Defendants  
 3 add that Plaintiffs' argument that Defendants will engage in gamesmanship is not supported.

4 Defendants have the better argument. Plaintiffs proposed language assumes that other  
 5 parties may engage in gamesmanship and attempts to use the protective order to prevent all  
 6 instances of wrongdoing. But the more appropriate way to deal with gamesmanship and bad faith  
 7 litigation tactics is to bring the appropriate motion if and when they occur, not to attempt to  
 8 preempt them with a protective order. The Court will thus require the parties' stipulated  
 9 protective order to include Defendants' proposed language.

10 12. Paragraph 12.3 – Filing Protected Material.

11 The parties disagree over language governing how parties should file confidential  
 12 documents and what happens if the Court denies a motion to seal. However, the Nevada Local  
 13 Rules and the Ninth Circuit have already established this process. The Court will thus require  
 14 that the parties stipulated protective order contain the below language:

15 A party seeking to file a confidential document under seal must file  
 16 a motion to seal and must comply with the Ninth Circuit's directives  
 17 in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th  
 18 Cir. 2006) and *Center for Auto Safety v. Chrysler Group, LLC*, 809  
 19 F.3d 1092, 1097 (9th Cir. 2016). Attorneys must file documents  
 20 under seal using the Court's electronic filing procedures. *See* Local  
 Rule IA 10-5. Papers filed with the Court under seal must be  
 accompanied with a concurrently-filed motion for leave to file those  
 documents under seal. *See* Local Rule IA 10-5(a).

21 The Court has approved the instant protective order to facilitate  
 22 discovery exchanges, but there has been no showing, and the Court  
 23 has not found, that any specific documents are secret or confidential.  
 24 The parties have not provided specific facts supported by  
 25 declarations or concrete examples to establish that a protective order  
 26 is required to protect any specific trade secret or other confidential  
 27 information pursuant to Rule 26(c) or that disclosure would cause  
 28 an identifiable and significant harm. The fact that the Court has  
 entered the instant stipulated protective order and that a party has  
 designated a document as confidential pursuant to that protective  
 order does not, standing alone, establish sufficient grounds to seal a  
 filed document. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331  
 F.3d 1122, 1133 (9th Cir. 2003); *see also Beckman Indus., Inc. v.*

*Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). If the sole ground for a motion to seal is that the opposing party (or non-party) has designated a document as confidential, the designator shall file (within seven days of the filing of the motion to seal) either (1) a declaration establishing sufficient justification for sealing each document at issue or (2) a notice of withdrawal of the designation(s) and consent to unsealing. If neither filing is made, the Court may order the document(s) unsealed without further notice.

**C. *The Norcold Defendants' motion to quash and for protective order.***

Rule 45 governs the issuance of subpoenas requiring non-parties to produce designated documents. *See* Fed. R. Civ. P. 45(a)(1)(A)(iii); *see Millenium Drilling Co., Inc. v. Beverly House-Meyers Revocable Trust*, No. 2:12-cv-00462-MMD-CWH, 2015 WL 13940564, at \*1 (D. Nev. Jan. 8, 2015) (“A Rule 45 subpoena is required to obtain testimony or documents from one who is not a party to the action or controlled by a party to the action.”). A court must grant a timely motion to quash or modify a subpoena that fails to allow reasonable time to comply, requires a person to comply beyond the geographical limits specified in Rule 45(c), requires disclosure of privileged or other protected matter, if no exception or waiver applies, or subjects a person to undue burden. *See* Fed. R. Civ. P. 45(d)(3)(A). The movant seeking to quash a subpoena bears the burden of persuasion. *Green v. Baca*, 226 F.R.D. 624, 653 (C. D. Cal. 2005).

“Rule 26(c) permits courts to issue a protective order upon a showing of good cause to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Torres v. Rothstein*, No. 2:19-cv-00594-APG-EJY, 2020 WL 3808899, at \*5 (D. Nev. July 6, 2020). This “burden is upon the party seeking the order to ‘show good cause’ by demonstrating harm or prejudice that will result from the discovery.” *Wells Fargo Bank, N.A. v. Iny*, No. 2:13-cv-01561-MMD-NJK, 2014 WL 1796216, at \*3 (D. Nev. May 6, 2014) (internal citation and quotation marks omitted). The moving party can satisfy its burden by showing that the discovery requested is irrelevant, overly broad, burdensome, or oppressive. *Heyman v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:15-cv-01228-RFB-GWF, 2018 WL 10323384, at \*1 (D. Nev. Apr. 20, 2018).

“When a party seeks the deposition of a high-level executive (a so-called ‘apex’ deposition), courts have ‘observed that such discovery creates a tremendous potential for abuse or



1 harassment.” *Jensen v. BNSF Rwy. Co.*, No. 3:13-cv-05955-HSG (LB), 2015 WL 3662593, at  
2 \*2 (N.D. Cal. May 19, 2015) (quoting *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259,  
3 262–63 (N.D. Cal. 2012)). “The court therefore has discretion to limit discovery where the  
4 discovery sought ‘can be obtained from some other source that is more convenient, less  
5 burdensome, or less expensive.’” *Id.* (quoting *Apple*, 282 F.R.D. at 263). “‘In determining  
6 whether to allow an apex deposition, courts consider (1) whether the deponent has unique first-  
7 hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking  
8 the deposition has exhausted other less intrusive discovery methods.’” *Id.* at \*3 (quoting *Apple*,  
9 282 F.R.D. at 263). “‘A party seeking to prevent a deposition carries a heavy burden to show  
10 why discovery should be denied.’” *Id.* (quoting *Apple*, 282 F.R.D. at 263). “Thus, it is very  
11 unusual ‘for a court to prohibit the taking of a deposition altogether absent extraordinary  
12 circumstances.’” *Id.* (quoting *Apple*, 282 F.R.D. at 263). “‘When a witness has personal  
13 knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to  
14 deposition.’” *Id.* (quoting *Apple*, 282 F.R.D. at 263). “‘A claimed lack of knowledge, by itself it  
15 is insufficient to preclude a deposition.’” *Id.* (quoting *Apple*, 282 F.R.D. at 263).

16 Here, the Court grants the Norcold Defendants’ motion to quash and for a protective  
17 order. Regarding the motion to quash, although Plaintiffs assert that their subpoena was proper  
18 because Mr. Hillenbrand is not a named party, he is the Chairman/President and Director of two  
19 named parties. As a result, a subpoena was unnecessary to depose him. The Court thus grants the  
20 motion to quash.

21 The Court also grants the motion for protective order. The Norcold Defendants have  
22 persuasively argued that, although Mr. Hillenbrand has knowledge of the topics Plaintiffs seek to  
23 depose him about, he does not have unique knowledge. And Plaintiffs have noticed Rule 30(b)(6)  
24 depositions of both Norcold and Thetford in which they seek the same information that they do in  
25 Mr. Hillenbrand’s deposition. The Court thus finds that the Plaintiffs have not exhausted other  
26 less intrusive discovery means. Additionally, the Norcold Defendants have persuasively argued  
27 that Mr. Hillenbrand’s deposition will be oppressive and expensive because it will be repetitive of  
28 the 30(b)(6) depositions and thus repetitive of attorney time and will take Mr. Hillenbrand away



1 from his duties directing the companies. Because the Court finds that a protective order is proper  
2 on the grounds that Mr. Hillenbrand is an apex witness, it does not reach the issue of whether the  
3 topics are relevant or proportional.

4  
5 **IT IS THEREFORE ORDERED** that Homesite's motion to amend its complaint (ECF  
6 No. 68) is **granted**.

7 **IT IS FURTHER ORDERED** that Homesite's joint motion for a protective order (ECF  
8 No. 69) is **granted in part and denied in part**.

9 **IT IS FURTHER ORDERED** that the parties are directed to file a stipulated protective  
10 order including the terms the Court has discussed herein and the terms to which the parties have  
11 already agreed on or before **July 14, 2023**.

12 **IT IS FURTHER ORDERED** that the Norcold Defendants' motion to quash and motion  
13 for protective order (ECF Nos. 80, 81) are **granted**.

14  
15 DATED: June 15, 2023

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18 DANIEL J. ALBREGTS  
19 UNITED STATES MAGISTRATE JUDGE  
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